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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

10 ALFREDO MEDINA,) NO. ED CV 07-0531-CT
11 Plaintiff,)
12 v.) OPINION AND ORDER
13 MICHAEL J. ASTRUE,)
14 COMMISSIONER, SOCIAL SECURITY)
ADMINISTRATION,)
15 Defendant.)
16 _____)

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18 For the reasons set forth below, it is ordered that judgment
19 be entered in favor of defendant Commissioner of Social Security
20 ("the Commissioner") because the Commissioner's decision is
21 supported by substantial evidence and is free from material legal
22 error.

23 SUMMARY OF PROCEEDINGS

24 On May 11, 2007, plaintiff, Alfredo Medina ("plaintiff"),
25 filed a complaint seeking judicial review of the denial of benefits
26 by the Commissioner pursuant to the Social Security Act ("the
27 Act"). The parties consented in writing to proceed before the
28 magistrate judge. On August 23, 2007, plaintiff filed a brief in

1 support of the complaint. On October 1, 2007, the Commissioner
2 filed an opposition brief.

3 SUMMARY OF ADMINISTRATIVE RECORD

4 1. Proceedings

5 On September 30, 2004, plaintiff filed an application for
6 disability insurance benefits, alleging disability since August 13,
7 2004 due to hypertension, diabetes, high cholesterol, body pain and
8 numbness in extremities, dizziness, pain in eyes and head, stomach
9 ulcer, memory and concentration loss, depression, anxiety, insomnia
10 and impotence. (TR 18, 88-97).¹ The application was denied
11 initially and upon reconsideration. (TR 18, 34, 36, 46-50, 53).

12 Plaintiff filed a request for a hearing, and on August 29,
13 2006 plaintiff, appearing pro se, testified before an ALJ. (TR
14 309-320). On October 10, 2006, the ALJ issued a decision that
15 plaintiff's diabetes mellitus and impairments of the
16 musculoskeletal system were severe impairments, but that he was
17 capable of performing a range of medium work, which enabled him to
18 perform his past relevant work as an auto parts order filler.
19 Accordingly, the ALJ found that plaintiff was not disabled, as
20 defined by the Act, and thus was not eligible for benefits. (TR
21 18-23). Plaintiff's request to the Social Security Appeals Council
22 to review the ALJ's decision was denied on February 28, 2007. (TR
23 3). Accordingly, the ALJ's decision stands as the final decision
24 of the Commissioner. Plaintiff subsequently sought judicial review

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¹ "TR" refers to the transcript of the record of
27 administrative proceedings in this case and will be followed by
the relevant page number(s) of the transcript.

in this court.

2. Summary Of The Evidence

The ALJ's decision is attached as an exhibit to this opinion and order and, except as otherwise noted, materially summarizes the evidence in the case.

PLAINTIFF'S CONTENTIONS

1. The ALJ failed to properly consider his treating physicians' opinions regarding plaintiff's mental impairment;
2. The ALJ failed to properly consider the consultative psychiatric examination;
3. The ALJ erred in finding plaintiff's mental impairment to be non-severe; and,
4. The ALJ failed to consider or discuss the third party statement of plaintiff's sister-in-law, Juanita Contreras.

STANDARD OF REVIEW

Under 42 U.S.C. §405(g), this court reviews the Commissioner's decision to determine if: (1) the Commissioner's findings are supported by substantial evidence; and, (2) the Commissioner used proper legal standards. Macri v. Chater, 93 F.3d 540, 543 (9th Cir. 1996). Substantial evidence means "more than a mere scintilla," Richardson v. Perales, 402 U.S. 389, 401 (1971), but less than a preponderance. Sandgathe v. Chater, 108 F.3d 978, 980 (9th Cir. 1997).

When the evidence can reasonably support either affirming or reversing the Commissioner's conclusion, however, the Court may not

1 substitute its judgment for that of the Commissioner. Flaten v.
2 Secretary of Health and Human Services, 44 F.3d 1453, 1457 (9th
3 Cir. 1995).

4 DISCUSSION

5 1. The Sequential Evaluation

6 A person is "disabled" for the purpose of receiving social
7 security benefits if he or she is unable to "engage in any
8 substantial gainful activity by reason of any medically
9 determinable physical or mental impairment which can be expected to
10 result in death or which has lasted or can be expected to last for
11 a continuous period of not less than 12 months." 42 U.S.C.
12 §423(d)(1)(A).

13 The Commissioner has established a five-step sequential
14 evaluation for determining whether a person is disabled. First, it
15 is determined whether the person is engaged in "substantial gainful
16 activity." If so, benefits are denied.

17 Second, if the person is not so engaged, it is determined
18 whether the person has a medically severe impairment or combination
19 of impairments. If the person does not have a severe impairment or
20 combination of impairments, benefits are denied.

21 Third, if the person has a severe impairment, it is determined
22 whether the impairment meets or equals one of a number of "listed
23 impairments." If the impairment meets or equals a "listed
24 impairment," the person is conclusively presumed to be disabled.

25 Fourth, if the impairment does not meet or equal a "listed
26 impairment," it is determined whether the impairment prevents the
27 person from performing past relevant work. If the person can

1 perform past relevant work, benefits are denied.

2 Fifth, if the person cannot perform past relevant work, the
3 burden shifts to the Commissioner to show that the person is able
4 to perform other kinds of work. The person is entitled to benefits
5 only if the person is unable to perform other work. 20 C.F.R. §
6 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).

7 2. Mental Impairment (Issues 1-3)

8 Plaintiff contends that the ALJ erred in finding his
9 depression and anxiety to be non-severe because the ALJ failed to
10 properly consider both the discussion of his depression and anxiety
11 in his doctors' treatment notes and the findings of Dr. Reynaldo
12 Abejuela, who conducted a psychiatric examination of plaintiff on
13 January 24, 2005.

14 A severe impairment or combination of impairments is one which
15 significantly limits the physical or mental ability to perform
16 basic work activities. 20 C.F.R. § 404.1520(c); see also 20 C.F.R.
17 § 404.1521(b) (describing basic work activities). A plaintiff is
18 not required to establish total disability at this level of the
19 evaluation. Rather, the severe impairment requirement is a
20 threshold element that plaintiff must prove in order to establish
21 disability within the meaning of the Act. Bowen v. Yuckert, 482
22 U.S. 137, 146 (1987). An impairment will be considered non-severe
23 when medical evidence establishes only a "slight abnormality or a
24 combination of slight abnormalities which would have no more than a
25 minimal effect on the individual's ability to work even if the
26 individual's age, education, or work experience were specifically
27 considered." Social Security Ruling 85-28; Bowen v. Yuckert, 482

1 U.S. at 154 n.12.

2 Alleged mental impairments are evaluated under the same
3 sequential analysis as physical impairments. Once the Commissioner
4 determines that a mental impairment exists, the Commissioner must
5 then evaluate the degree of functional loss it causes by rating
6 plaintiff's level of functional limitation in four areas:
7 (1) activities of daily living; (2) social functioning;
8 (3) concentration, persistence, and pace; and (4) deterioration or
9 decompensation in work or work-like settings. If an individual's
10 limitations are rated as mild in the first three areas and the
11 individual has had no episodes of deterioration or decompensation,
12 the mental impairment will normally be found to be not severe. 20
13 C.F.R. § 404.1520a.

14 Here, the ALJ found, after considering all the evidence of
15 record, that the evidence was insufficient "to establish the
16 presence of a severe mental impairment." (TR 20). As the ALJ
17 noted, this finding is supported by the opinions of the state
18 agency physicians, who reviewed plaintiff's records, and Dr.
19 Abejuela. (TR 268-70, 291, 308). See Thomas v. Barnhart, 278 F.3d
20 947, 957 (9th Cir. 2002) ("The opinions of non-treating or non-
21 examining physicians may also serve as substantial evidence when
22 the opinions are consistent with independent clinical findings or
23 other evidence of record").

24 Plaintiff contends that Dr. Abejuela's examination does not
25 support the ALJ's finding that plaintiff's mental impairment is
26 non-severe. However, as plaintiff concedes, Dr. Abejuela found
27 that plaintiff's mental impairment has only a slight to mild impact

1 on areas of workplace functioning. (TR 268-69). This describes a
 2 non-severe impairment. See 20 C.F.R. § 404.1520a. Indeed, Dr.
 3 Abejuela emphasized that his slight to mild findings were in spite
 4 of the fact that plaintiff was seeing no psychiatrist and taking no
 5 psychiatric medications at the time of the examination. (TR 269).
 6 Dr. Abejuela also noted that plaintiff "agreed that his main
 7 problem is the physical problem and that is why he is applying for
 8 disability." (Id.)

9 Plaintiff also contends that the ALJ failed to properly
 10 consider his treating physicians' "opinions" concerning his
 11 depression and anxiety contained in their treatment notes. While
 12 an ALJ is not bound by the opinions of plaintiff's treating
 13 physicians, he must provide clear and convincing reasons for
 14 rejecting an uncontradicted opinion of a treating physician and
 15 specific and legitimate reasons for rejecting a treating
 16 physician's opinion that is contradicted by the opinions of other
 17 doctors. See Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir.
 18 1989) (citations omitted).

19 However, in this case the treatment notes -- most of which are
 20 from a time period when plaintiff was admittedly working -- contain
 21 no opinions as to limitations caused by plaintiff's depression and
 22 anxiety. Instead, these scattered reports essentially restate
 23 plaintiff's subjective complaints and reports.² (See TR 160-63,
 24 183-84, 188-89). Plaintiff points to the fact that at times
 25 plaintiff's doctors apparently prescribed Paxil and Prozac. (See

26 ²The ALJ found that plaintiff's allegations not entirely
 27 credible (TR 22), a finding not challenged here.

1 TR 160, 189). This fact does not demonstrate that plaintiff has a
 2 severe mental impairment. As discussed above, in January of 2005,
 3 plaintiff reported to Dr. Abejuela that he was seeing no
 4 psychiatrists and taking no psychiatric medications.

5 In fact, Dr. Abejuela reviewed and considered plaintiff's
 6 medical records as part of his consultative psychiatric exam and
 7 assessment of plaintiff. Dr. Abejuela specifically discussed the
 8 findings of Dr. Francisco Torres, a physician to whom plaintiff was
 9 referred for a neurology examination. As Dr. Abejuela observed,
 10 Dr. Torres reported that plaintiff was referred to him "because he
 11 has developed some kind of anxiety." (TR 163, 264-65). Dr.
 12 Torres' exam was essentially normal and he found no neurological
 13 deficits with the exception of possible mild peripheral neuropathy.
 14 (TR 163-64). Dr. Abejuela noted that Dr. Torres' recommended
 15 treatment was for plaintiff to take vitamins. (TR 164, 268).

16 The record indicates that plaintiff is no longer working
 17 because he was laid off from his job, not because he has a severe
 18 and disabling mental impairment. The date plaintiff alleges that
 19 he became disabled and could no longer work is the date plaintiff
 20 was laid off from his job. (TR 89, 312). Plaintiff reported to his
 21 physician that his depression was secondary to work stress related
 22 to his impending layoff. (TR 182). Plaintiff's doctor told him he
 23 could not give him disability, but suggested that the state may
 24 provide assistance so plaintiff could find a new job. (TR 184).

25 Thus, the ALJ correctly concluded that the record evidence,
 26 including the treatment notes of plaintiff's doctors, does not
 27 demonstrate a severe mental impairment. The ALJ's finding that

plaintiff's alleged mental impairment was non-severe is supported by substantial evidence and free from material legal error.

3. Lay Witness Testimony (Issue 4)

Plaintiff also contends that the ALJ erred by failing to consider the third party statement of his sister-in-law, Juanita Contreras. (TR 63-71).

In determining whether a plaintiff is disabled, an ALJ must consider lay witness testimony concerning a plaintiff's ability to work. Stout v. Commissioner of Soc. Security Admin., 454 F.3d 1050, 1053 (9th Cir. 2006). Lay testimony "as to a [plaintiff's] symptoms or how an impairment affects ability to work is competent evidence . . . and therefore cannot be disregarded without comment." Id. (citations omitted). Consequently, "[i]f the ALJ wishes to discount the testimony of the lay witness, he must give reasons that are germane to each witness for doing so." Id. (citations omitted).

In Stout, the court held that the ALJ erred in failing to discuss lay testimony concerning how the plaintiff's impairments impacted his ability to work. 454 F.3d at 1054. The lay testimony was not contradicted by the medical evidence. Id. at 1053.

Here, plaintiff's sister-in-law did not testify, but did submit a third party statement. In the statement, she claims to have known plaintiff all her life and states that she sees him "once a week," and that "we talk, and have family gatherings." (TR 63). She essentially mirrors plaintiff's allegations concerning his physical limitations due to his pain and fatigue. (Compare TR 68 with TR 77). She states that plaintiff can walk only a few feet

1 before having to rest for 10 minutes. (Id.)

2 The ALJ considered all the evidence of record in assessing
3 plaintiff's residual functional capacity and considered all
4 symptoms and the extent to which the symptoms were consistent with
5 the objective medical evidence and other evidence. (TR 21). The
6 ALJ did not specifically discuss the third party statement of
7 plaintiff's sister-in-law, but did give specific reasons for
8 finding plaintiff's essentially identical allegations less than
9 fully credible. (TR 22-23).

10 The ALJ did not materially err in failing to explicitly
11 discuss the statement of plaintiff's sister-in-law for a number of
12 reasons. First, unlike the testimony in Stout given by the
13 plaintiff's boss/co-worker and his sister, witnesses who had
14 personal knowledge of the plaintiff's limitations relating to
15 workplace functioning, the statements of petitioner's sister-in-law
16 concerning plaintiff's daily activities are not competent evidence,
17 as she candidly admits that she does not know what plaintiff does
18 during the day. (TR 63).

19 Second, unlike the lay testimony in Stout, the sister-in-law's
20 statements concerning petitioner's physical limitations are not
21 uncontradicted. Ms. Contreras stated that plaintiff could not walk
22 more than 10-12 feet without having to rest and getting out of
23 breath. (TR 68). In contrast, after a thorough consultative
24 examination, Dr. Adi Klein, a board certified internal medicine
25 specialist, found that plaintiff had normal lungs, heart function,
26 strength, and a normal gait, and concluded that plaintiff could
27 walk for six out of eight hours a day with appropriate breaks, a

1 finding consistent with the ALJ's assessment of plaintiff's
 2 residual functional capacity. (TR 21, 276-77). Similarly, Ms.
 3 Contreras asserted that plaintiff has problems with concentration
 4 and completing tasks, but Dr. Abejuela found that plaintiff had no
 5 mental restriction in his daily activities and only a slight
 6 impairment in his concentration, persistence and pace. (TR 268-
 7 69).

8 Third, the third party statement of plaintiff's sister-in-law
 9 simply restates plaintiff's own allegations and is relevant to the
 10 credibility of those allegations. See 20 C.F.R. § 404.1529 (in
 11 evaluating symptoms, Commissioner will consider, *inter alia*,
 12 information provided by other persons); Social Security Ruling 96-
 13 7p (in determining credibility of allegations regarding symptoms,
 14 the ALJ must consider the entire record, including statements by
 15 other persons about the symptoms and how they affect an
 16 individual). The ALJ specifically provided reasons for finding the
 17 nearly identical allegations of plaintiff less than credible. (TR
 18 22-23). *In this case plaintiff does not challenge the ALJ's*
 19 *finding as to the credibility of his allegations.* Accordingly, the
 20 court finds that any error in the ALJ's failure to specifically
 21 discuss the similar statements of plaintiff's sister-in-law was
 22 harmless. See Stout, 454 F.3d at 1054 (failure to discuss
 23 uncontradicted lay testimony harmless where no reasonable ALJ, when
 24 fully crediting the testimony, would have reached a different
 25 result).

26 In Robbins v. Commissioner, 466 F.3d 880 (9th Cir. 2006), the
 27 court applied the Stout court's harmless error analysis to the

1 ALJ's failure to discuss plaintiff's son's testimony concerning
 2 plaintiff's limitations. 466 F.3d at 885. Although the ALJ had
 3 discussed the similar testimony by plaintiff's daughter, the
 4 Robbins court found the failure to discuss the son's testimony was
 5 not harmless error under the Stout test. Id. The Robbins court
 6 based its finding on the fact that the ALJ *also* failed to properly
 7 consider Robbins' own testimony and that the son's testimony, if
 8 credited, would add substantial weight to the allegations of the
 9 plaintiff and other lay witnesses. Id. The court explained:
 10 "[b]ecause the ALJ did not make a legally sufficient adverse
 11 credibility finding with regard to Robbins's own testimony, we
 12 cannot say that 'no reasonable ALJ, when fully crediting the
 13 testimony, could have reached a different disability
 14 determination.'" Id. (quoting Stout, 454 F.3d at 1056). Here, in
 15 contrast, the ALJ's credibility finding with respect to plaintiff's
 16 testimony is not challenged.

17 The ALJ did not materially err in his consideration of the
 18 third party statement of plaintiff's sister-in-law.

19 CONCLUSION

20 If the evidence can reasonably support either affirming or
 21 reversing the Commissioner's conclusion, the court may not
 22 substitute its judgment for that of the Commissioner. Flaten v.
 23 Secretary of Health and Human Services, 44 F.3d at 1457.

24 After careful consideration of the record as a whole, the
 25 magistrate judge concludes that the Commissioner's decision is
 26 supported by substantial evidence and is free from material legal
 27 error. Accordingly, it is ordered that judgment be entered in

1 favor of the Commissioner.

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3 DATED: October 10, 2007

4 CAROLYN TURCHIN

5 CAROLYN TURCHIN
6 UNITED STATES MAGISTRATE JUDGE

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